

Law Offices

Weiss, Rothfarb & Chernofsky

WILLIAM L. WEISS
IRVIN ROTHFARB
CHARLES B. CHERNOFSKY

*6 East 43rd Street
New York, N.Y. 10017*

APR 6 1978
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cc \$
cc Washington, D. C.

9314
RECORDATION NO. Filed & Recorded

APR 6 1978 - 3 25 PM

April 3, 1978

INTERSTATE COMMERCE COMMISSION

Attention: Mrs. Lydia Wright

Interstate Commerce Commission
Office of the Secretary
Recording Section
Washington, D. C. 20423

Re: Railway Freight Car Services, Inc. and
Erie Western Railway

Dear Mrs. Wright:

You will find enclosed our check in the amount of \$50 payable to the order of the Interstate Commerce Commission together with four copies of an Operating and Use Agreement between Railway Freight Car Services, Inc. as Owner and Erie Western Railway, as User.

Please return to us, upon filing of the enclosed, a receipt copy of same in the stamped, self-addressed envelope enclosed for that purpose.

Very truly yours,


William L. Weiss

WLW:AB
enclosures

INTERSTATE
COMMERCE COMMISSION
RECEIVED

OA APR 5 1978

ADMINISTRATIVE SERVICES
MAIL UNIT

RECEIVED
APR 6 3 20 PM '78
CERTIFICATION UNIT

Interstate Commerce Commission
Washington, D.C. 20423

4/7/78

OFFICE OF THE SECRETARY

William L. Weiss
Weiss, Rothfarb & Chernofsky
6 East 43rd Street
New York, N.Y. 10017

Dear Sir:

The enclosed document(s) was recorded pursuant to the
provisions of Section 20(c) of the Interstate Commerce Act,
49 U.S.C. 20(c), on 4/6/78 at 3:25pm
and assigned recordation number(s) 9314

Sincerely yours,

H.G. Homme, Jr.
Acting Secretary

Enclosure(s)

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(6/77)

APR 6 1978 - 3 22 PM

OPERATING AND USE AGREEMENT

INDIAN STATE COMMERCE COMMISSION

AGREEMENT made and entered into this 1st day of March, 1978, between RAILWAY FREIGHT CAR SERVICES, INC., a Delaware corporation (hereinafter called "Owner"), and ERIE WESTERN RAILWAY, an Indiana corporation, (hereinafter called "User").

WITNESSETH:

WHEREAS, User desires to obtain from Owner certain railroad cars, hereinafter specifically designated or to be specifically designated for the purposes and upon the terms and conditions as set forth in this agreement.

NOW, THEREFORE, the parties hereto agree as follows:

1. Cars to be Furnished: Owner agrees to make available to User, and User agrees to use in its operations during the term of this agreement that number of used railroad cars to be provided by Owner upon the terms and conditions and for the amounts hereinafter set forth, which cars are sometimes hereinafter called the "Cars". They will be 50'-70 ton Cars. The number of Cars and any additional description of the Cars, including any Association of American Railroads (A.A.R.) mechanical designation, identifying marks, road or serial numbers to be delivered to User upon the execution of this agreement, are set forth in Appendix A hereto. Any additional Cars delivered to User shall be provided for and accepted by User as provided

in Paragraph 5, on the basis set forth in Paragraph 4 hereof.

When any such subsequent delivery of Cars is made, an amendment to Appendix A shall be executed by User and Owner indicating the type and description of the Cars involved, as reflected in Appendix A for Cars delivered upon the execution of this agreement. Upon acceptance by User of any subsequently delivered Cars, the provisions of this agreement shall become fully applicable thereto.

2. Term of Agreement: The term of this Agreement for the fifty foot boxcars delivered hereunder shall commence upon their acceptance by User, as provided for in Paragraph 5 hereof, and shall terminate ten years from the date of this agreement, irrespective of the date of the acceptance of any Car.

3. Delivery and Use of Cars: Owner agrees to deliver at its expense, and User agrees to accept the Cars at such point or points to which the parties may agree, not necessarily on User's property. Owner's obligation as to such deliveries shall be subject to all delays resulting from causes beyond its control. User agrees to use the Cars exclusively in its own or connecting line service, and none of the Cars, except with the prior written consent of Owner, shall be shipped beyond the boundaries of the United States, Canada or Mexico. Owner agrees to apply User's reporting marks to the Cars, notwithstanding that title to them shall at all times remain in Owner, and Owner may at its option apply appropriate marks on the Cars to show title in Owner. Owner will also cause each Car to be marked with User's road numbers

referred to in Appendix A. Such road numbers shall not be changed, except by agreement of both Owner and User. As long as User shall not be in default under this agreement, User shall be entitled to the possession of the Cars and shall have the full right of use thereof upon the lines of any railroad owned, leased or operated by User, or over which User has trackage rights, and upon connecting and other railroads in the usual interchange of freight cars, but subject at all times to all terms and conditions of this agreement.

4. Charges: The charge per Car per day shall be all per diem, incentive per diem and mileage payable to User on account of such Car per day when Car usage is equal to or less than 90% of the maximum income that would be earned assuming the Cars were in use and earning income in each day of the calendar month, assuming that the Cars traveled 50 miles per day. Any amount over 90% as referred to above, payable to User shall be divided equally between User and Owner. The charges per each Car shall be that amount of the car hire rates applicable under the ICC Car Hire Rate Table in effect from time to time during the term of this agreement and when User is using such Cars (herein called the "Charge"). Such charge shall be applicable from the date of acceptance as provided in Paragraph 5 and until such Car is returned to Owner upon the termination of this agreement. User shall make payments monthly and report to Owner on a monthly basis in writing with respect to amounts deposited in accordance with the provisions of subparagraph (a)

below and shall provide for Owner a breakdown of all moneys received constituting per diem, mileage and incentive per diem. Such charges shall be due and paid monthly. The User shall have the right to retain one-half of any amount over 90% of collections using a quarterly period as the basis for computation. Payments shall be made to Owner and accounted for as follows:

(a) All moneys received by User on account of use of the Cars by others shall be received and held in trust and promptly deposited in a bank account which will be maintained by User in a depository of its choice and on which it will be the sole signatory (herein called the "Income Account").

5. Acceptance of Cars by User at Owner's Expense: Each of the Cars shall be subject to User's inspection and approval, and shall thereupon be accepted in writing by a duly authorized officer of User. Notwithstanding the foregoing, or whether such writing is furnished by User, the loading of each such Car by User or at its direction or by any other railroad or delivery of any Car to any railroad interchange which Car shall be in conformity with the American Association of Railroads Rules and Regulations pertaining to standards of car repair or car fitness for interchange shall be conclusive evidence that said Car is in fit and suitable condition, and shall constitute and be deemed to be acceptance thereof by User. The User agrees to load these Cars before any 50' foreign boxcars on its lines in order to insure maximum utilization of the Cars.

6. Reports of Car Movements: User agrees that it will secure from other railroads, and provide Owner with reports of all Car movements. User also agrees to furnish to Owner whenever required by it an accurate statement, signed by its President or a Vice President, of the amount, description and numbers of Cars: (i) which have been furnished under this agreements; (ii) which may have been worn out, become obsolete, lost, destroyed or rendered unfit for use by accident or otherwise; (iii) which require repairs and in what manner and to what extent; and (iv) which are currently undergoing repairs, and in what manner and to what extent.

7. Maintenance or Repairs: After acceptance of any Car by User, it shall at all times thereafter during the term of this Agreement, at Owner's cost and expense, maintain and keep the Cars in good and proper repair and running condition. In the event that any of the Cars, or the fittings, removable parts, appliances or appurtenances thereto shall in any manner be damaged, destroyed, lost, removed or stolen, User agrees to assume financial responsibility for such damage as may occur on User's railroad. User also agrees at Owner's cost to comply with and maintain the Cars in accordance with all governmental laws, regulations and requirements, and with the Rules of Interchange of the Association of American Railroads (or of any successor thereto), with respect to the use, maintenance and

operation of the Cars during the continuance of this agreement. In the event that any equipment or appliance on any Car shall be required to be changed or replaced, whether removable or otherwise, or any additional or other equipment or appliance is required to be installed on any Car in order to comply with such laws, regulations, requirements and rules effective after the date of the delivery of such Car, after receipt of written permission to make repairs, User agrees to make such changes, additions, and replacements at Owner's expense, but such expenses shall include only costs of material and direct labor, plus General Manager's Association of Chicago additives in effect at that time. Any parts installed or replacements made upon the Cars by User shall be considered accessions to the Cars and title thereto shall be immediately vested in Owner. User also agrees to perform at Owner's expense whatever maintenance may be necessary to conform to the provisions of Paragraph 13 of this agreement pertaining to condition of Cars upon return of Cars to Owner.

Owner may notify User of any repairs which may be required for any Car, and in the event that User shall fail to make such repairs promptly, Owner will perform or authorize such repairs.

8. Cars Removed from Service: In the event of the loss or destruction of any Car from any cause whatsoever during the term of this agreement, the Charge with respect to such Cars shall terminate upon receipt by Owner of written notification

thereof or when per diem earnings are terminated by any railroad causing loss or destruction. The Owner or its insurer shall have the rights of subrogation and indemnification to and for any claim for loss or destruction and thereunder may, at its option, assume the right to collect its claim for the value of such Car from the party responsible and liable for the loss or destruction of the Car. In furtherance of the foregoing, User hereby authorizes and empowers Owner in Owner's own name, or in the name of and as attorney hereby irrevocably constituted for User to ask, sue for, collect, receive and enforce any and all rights to which User may be entitled by reason of the destruction of the said Car. In the event any Car is reported to be bad ordered and Owner elects to permanently remove such Car from User's service, rather than have such Car taken to a railroad or car shop for repairs, the Charge with respect to such Car shall terminate upon receipt by Owner of notification that such car was bad ordered. Owner shall have the right, but shall not be obligated, to substitute for any such Car another Car of the same type and capacity and the monthly Charge with respect to such substituted Car shall commence upon delivery of such substituted Car to User.

9. Responsibility for Damage to Lading: Owner shall not be liable for any loss or damage to commodities, or any part thereof, loaded or shipped in or on the Cars, and User agrees

to assume financial responsibility for, to indemnify Owner against, and to save it harmless from any such loss or damage.

10. Idemnification by User: User agrees to indemnify and save harmless Owner against any loss, liability, claim, damage or expense (including the reasonable cost of investigating and defending against any claim for damages) which Owner may incur by reason of its ownership of the Cars during the term hereof, arising out of or in connection with the use of the Cars other than damage to the Car itself and save Owner harmless against any claim or suit by reason of any accident resulting in damage to property or injury to any person, excepting, however, any loss, liability, claim, damage or expense when the Car for reason of repair or otherwise is in possession of Owner or under the direct control of Owner.

11. Assignment: User shall make no transfer or assignment of its interest under this agreement with respect to the Cars covered hereunder without Owner's prior written consent. No right, title or interest in any of these Cars shall vest in User by reason of this agreement except for the provisions of Paragraph 4 of this agreement, or by reason of the delivery to or use by User of the Cars, except the right to use the Cars in accordance with the terms of this agreement. Owner and any assignee of Owner shall be entitled to sell, assign and transfer its entire title and reversion in and to the Cars and/or its rights to Charges and other payments payable by User hereunder and to the performance of the other covenants herein

made by User, and such assignee or any subsequent assignee thereof shall have and succeed to all of the rights, duties and remedies herein conferred upon and reserved to Owner. User shall be obligated under this agreement to the Owner, assignee or subsequent assignee only upon receipt by User of written notification from both the Owner and its assignee or by any assignee or subsequent assignee that such assignment or subsequent assignment has taken place.

12. Remedies: If User shall fail to perform any of its obligations hereunder, Owner shall give written notice to User and, if User shall fail to cure within thirty days of such notice, Owner at its election may either (a) terminate this agreement immediately, or (b) withdraw the Cars which have to that date been delivered from the service of the User and deliver the same, or any thereof, to others upon such terms as Owner may see fit.

The time of payment of Charges is of the essence of this agreement. If User shall fail to carry out and perform any of its obligations under this agreement, or if a petition in bankruptcy, or for reorganization, or for a trustee or receiver is filed by or against User (unless such petition shall be dismissed within thirty days from the filing or other effective date thereof, or shall, within such period be nullified, stayed or otherwise rendered ineffective, or unless any such receiver(s) or trustee(s) shall, within thirty days from the date of his or their appointment, adopt this agreement pursuant to due authority

of the Court of his or their appointment), then and in any such event, Owner may, at its option, declare this agreement terminated and upon such declaration all Charges not theretofore due and payable shall forthwith become due and payable and Owner may enter upon the railroad or premises where the Cars or any of them may be and retake possession thereof, and remove User's road number and name therefrom. If Owner waives its said rights or does not declare this agreement terminated, User's obligations hereunder shall continue. The aforesaid remedies of Owner shall not be deemed exclusive, but shall be cumulative and in addition to all other rights and remedies given or provided by law or in equity. No delay or failure on the part of Owner to exercise any rights hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right preclude any other or further exercise thereof, and no act or omission to act by Owner against User or against any Car, or any delay or indulgence granted or allowed by Owner, shall prejudice any of Owner's rights.

13. Return of Cars: At the end of the term of this agreement, or upon any termination thereof for cause as defined herein, User shall forthwith and in the usual manner and at the usual speed of freight trains, draw the Cars to such point or points on its railroad and User further agrees that the Cars upon their return to Owner shall be in the same or as good condition as received, ordinary wear and tear excepted. User shall also

return Cars free from all accumulations or deposits from commodities transported in or on the Cars while in the service of User, and if not so returned, User shall reimburse Owner for any expense incurred in cleaning such Car or Cars. User shall, at the Owner's expense within twenty working days remove User's railroad markings from the Cars and place thereon such markings as so designated by Owner. After the removal and replacement of markings, User shall use its best efforts to load such Cars with freight and deliver them to a connecting carrier for shipment. User shall provide free storage on its railroad tracks for Owner for 180 days on any terminated Cars. The performance of the covenants by User contained above in this paragraph is of the essence of this agreement, and it is agreed that on application to any court of equity having jurisdiction in the premises that the Owner shall be entitled to a decree against User requiring specific performance thereof.

14. Other Payments: The following additional costs and expenses shall be the responsibility of and shall be paid by Owner:

(a) All license fees, assessments and sales, use, property and other tax or taxes now or hereafter imposed by any state, federal or local government upon the Cars herein provided, or upon the use thereof, whether assessed in the name of Owner or User. If User for any reason pays any of said Charges, Owner agrees to reimburse User promptly upon receipt of bills therefor.

15. Recordation: Owner at its option may cause this agreement to be filed and recorded with the Interstate Commerce Commission under the Interstate Commerce Act in order to publish notice of, and to protect the title of Owner to the Cars. User shall execute any and all other and further instruments as shall reasonably be requested by Owner to assure such publication and such protection of such title. Owner shall pay all costs, charges and expenses, including all recording and registration taxes and fees, incident to the filing, registering and/or recording of this agreement and of any instruments of further assurance hereunder.

16. Termination for Non-Usage: In the event that during any consecutive period of ninety days during the term of this agreement, the rentals shall be an amount less than 80% of the maximum income, exclusive of mileage, that might be earned assuming the Cars were in use and earning income each day of the calendar month, Owner shall have the right to terminate this agreement as to all or part of the Cars and if such right is exercised, Owner shall have all rights as provided in Paragraph 13 hereof, or User shall at Owner's option file with the Association of American Railroads requesting relief from AAR Car Service Rules 1 and 2.

17. All Parties Bound: Subject only to the limitations of Paragraph 11 hereof, this agreement shall be binding upon and inure to the benefit of the Owner and User and their respective successors and assigns.

18. Execution in Counterparts: This agreement may be simultaneously executed in two or more counterparts, each of which, so executed, shall be deemed to be an original, and such counterparts together shall constitute but one and the same agreement, which shall be sufficiently evidenced by any such original counterpart.

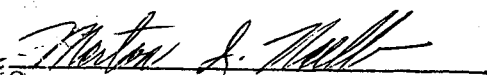
19. Notice in Writing: Any notice, demand or other communication hereunder shall be in writing and shall be deemed to have been duly given when personally delivered or deposited in the mail first class postage prepaid or delivered to a telegraph office charges prepaid, addressed as follows: If to the Owner: To the attention of Harvey Polly, President, RAILWAY FREIGHT CAR SERVICES, INC., 1440 Broadway, New York, New York 10018. If to the User: To the attention of Craig Burroughs, President, ERIE WESTERN RAILWAY, P. O. Box 510, Huntington, Indiana 46750, or addressed to either party at such other address as such party

shall hereafter furnish to the other in writing.


20. Construction: The remedies in this agreement provided in favor of the Owner shall not be deemed exclusive, but shall be cumulative, and shall be in addition to all other remedies in Owner's favor existing at law or in equity and may be exercised from time to time and as often and in such order as may be deemed expedient by the Owner. The captions herein are inserted for convenience only and shall not affect the construction of this agreement. No delay or omission of the Owner in the exercise of any right or power accruing upon any event of default shall impair any such right or power or shall be construed to be a waiver of such event of default or an acquiescence therein. The provisions of this agreement and all rights and obligations hereunder shall be governed by and construed in accordance with the laws of the State of New York and applicable federal laws.

IN WITNESS WHEREOF, Owner and User, respectively, each pursuant to due corporate authority, have caused these presents to be signed in their respective corporate names and thier respective corporate seals to be hereunto affixed, duly attested, as of the day and year first above written.

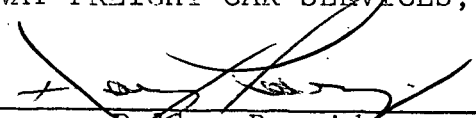
ATTEST: (Corporate Seal)


Secretary


ATTEST: (Corporate Seal)


Secretary

RAILWAY FREIGHT CAR SERVICES, INC

By 
Harvey Polly, President

ERIE WESTERN RAILWAY

By 
Craig Burroughs

On this ^{24th} day of March, 1978, before me personally appeared Craig Burroughs to me known, who being by me duly sworn, says that he is the President of ERIE WESTERN RAILWAY that the seal fixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Jean M. Nesburgh
Notary Public
A resident of Huntington
County, Indiana
My Commission Expires
11/21/81.

On this ^{April} 3rd day of ~~March~~, 1978 before me personally appeared Harvey Polly to me known, who being by me duly sworn, says that he is the President of RAILWAY FREIGHT CAR SERVICES, INC., that the seal fixed to the foregoing instrument is the corporate seal of said corporation, that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Annette Barletta
Notary Public

ANNETTE BARLETTA, Notary Public
State of New York, No. 60-4661528
Qualified in Westchester County
Cert. filed in New York County
Commission Expires March 30, 1979